(3) No. 97-309
(2) No. 97-314

Supreme Court, U.S.
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In The
SUPREME COURT OF THE UNITED STATES
October Term, 1997

THE AMERICAN BIBLE SOCIETY, et. al.

and

THE AMERICAN COUNCIL ON GIFT ANNUITIES, INC., individually, and as successor to the Committee on Gift Annuities, an unincorporated association, et. al.,

Petitioners,

vs.

BOYD L. RICHIE, as Guardian of the Estate of Louise T. Peter, on behalf of Louise T. Peter, individually and on behalf of all others similarly situated,

Respondent.

On Petition for Writ of Certiorari
To The United States Court of Appeals for the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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November 5, 1997

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QUESTIONS PRESENTED

1. Whether this Court may exercise its discretion to decline to review, under Congress' July 3, 1997 amendment to the Charitable Gift Annuity Antitrust Relief Act of 1995, the Fifth Circuit's April 9, 1997, decision dismissing Petitioners' frivolous appeal of the District Court's denial of Petitioners' motions to dismiss when Petitioners have pending in the District Court a request for the same relief sought in this Court?

2. Whether the Fifth Circuit correctly applied *Behrens v. Pelletier* and *Mitchell v. Forsyth* by holding that the existence of fact issues regarding whether Petitioners have established the elements of an alleged immunity from suit precluded appellate review of the District Court's decision regarding the alleged immunity?

3. Whether the Fifth Circuit clearly abused its discretion under Fed. R. App. P. 38 by imposing sanctions against Petitioners for immediately appealing and seeking mandamus for the District Court's denial their motion to dismiss Respondent's antitrust claims, denial of partial summary judgment on state law claims, and denial of various other interlocutory rulings, when fact issues existed as to the basic applicability of the antitrust exemption claimed and the other rulings fell outside of the collateral order doctrine?

4. Whether the Charitable Gift Annuity Antitrust Relief Act of 1995 created an immediately appealable immunity from suit even though on its face it merely created a defense to liability and nothing in the legislative history indicated that the statute created an immunity from suit?

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Boyd L. Richie, as Guardian of the Estate of Louise T. Peter, on behalf of Louise T. Peter individually and on behalf of all others similarly situated ("Respondent" or "Plaintiff") opposes Defendants' petitions for certiorari. Nothing about this appeal merits review by this Court on petition for writ of certiorari, and no reason exists for vacating and remanding the case to the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals (Pet. App. 1a-23a) is reported at 110 F.3d 1082. The opinion of the District Court (Pet. App. 24a-37a) is reported at 943 F. Supp. 685. Petitioners also appealed the denial of summary judgment on issues covered in an earlier opinion of the District Court: *Ozee v. American Council on Gift Annuities*, 888 F. Supp. 1318 (N.D. Tex. 1995).

STATEMENT OF THE CASE

Petitioners omit or discount significant aspects of the procedural history of this case that reveal the "uncertworthy" nature of this appeal and provide additional reasons supporting the Fifth Circuit's dismissal of Petitioners' appeals and sanctions award. Most importantly, the District Court is currently addressing the 1997 amendments to the Charitable Gift Annuity Antitrust Relief Act of 1995[1] by way of motions to dismiss or for judgment on the pleadings. Briefing has closed, and Respondent expects a ruling soon. Additionally, Petitioners state

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[1]In this Brief In Opposition, the phrases "Antitrust Relief Act" or "Act" refer to the 1995 version of this law, and the phrases "Amended Antitrust Relief Act" or "Amended Act" refer to the law as amended in 1997.

that the Fifth Circuit sanctioned them for appealing the District Court's refusal to dismiss the antitrust claims. But Petitioners frivolously appealed many different rulings of the District Court in their appeal to the Fifth Circuit and even invoked the more stringent mandamus jurisdiction of that court in the same Quixotic endeavor. In addition to the existence of fact issues regarding the application of the Antitrust Relief Act, Petitioners' entire conduct provided an alternative justification for sanctions.

A. THE LAWSUIT

Plaintiff brought this lawsuit in December 1994 to redress numerous wrongs. Specifically, Plaintiff initially alleged that: (1) Petitioners had conspired with each other to fix the rates of return on certain fixed-income products marketed by Petitioners as investments; (2) certain Petitioners had knowingly sold annuities in Texas when the state Insurance Commission had told them that their conduct was illegal; (3) certain Petitioners also operated trust businesses and managed money for the general public when the State Banking Commission had told them that was also illegal; and (4) certain Defendants had committed numerous breaches of fiduciary duty against Plaintiff.

On March 14, 1995, the district court denied a motion to dismiss asserting that Defendants' challenged activities did not constitute trade or commerce under the Sherman Act. On May 3, 1995, the trial court granted partial summary judgment as to one Defendant's illegal sale of annuities and money management services to Plaintiff. *Ozee v. American Council on Gift Annuities*, 888 F. Supp. 1318 (N.D. Tex. 1995).

B. THE INTERVENING LEGISLATION.

Subsequently, Defendants successfully lobbied for changes in applicable federal and state law. Congress passed the Antitrust Relief Act, which created an antitrust exemption for certain conduct by certain entities. The new statute made no mention of creating an immunity from suit, but rather provided a substantive defense on the merits to those who could meet its terms. Specifically, it provided:

> [I]t shall not be unlawful under any of the antitrust laws . . . for 2 or more persons described in section 501(c)(3) . . . that are exempt from taxation under section 501(a) . . . to use, or agree to use, the same annuity rate for the purpose of issuing 1 or more charitable gift annuities.

Defendants also pushed through Texas legislation purportedly authorizing nonprofit organizations to sell annuities without being licensed to sell insurance and to operate trust businesses for the general public without being organized as trust companies. TEX. BANKING CODE ANN. art. 342-1113(3); TEX. REV. CIV. STAT. ANN. art. 1396-2.31 (Texas Non-Profit Corporations Act); TEX. INS. CODE ANN. art. 1.14-1A § 2(a) and (b). Like the federal statute, the state statutes contained no mention of immunity from suit. Instead, they granted authority to engage in certain otherwise prohibited transactions and activities.

As a result of the new federal and state legislation, Defendants filed various motions to dismiss or for summary

judgment. Plaintiff opposed these motions and sought leave to amend his complaint to assert that Defendants were engaging in illegal activities that were outside the coverage of the new laws. In the face of the Antitrust Relief Act, Plaintiff alleged that the American Council on Gift Annuities, Inc. (the "Council") and others were not bona fide § 501(c)(3) entities and that the Council also procured its determination letter by fraud, which was aided and abetted by the other Defendants. Plaintiff further alleged that an illegal agreement between persons *not* described in § 501(c)(3) and not tax-exempt under § 501(a) with respect to CGAs *and* other life income products precluded application of the Act to this case. (Pet. App. at 49a-81a)

C. DEFENDANTS' FRIVOLOUS APPEALS TO THE FIFTH CIRCUIT.

This activity culminated when the district court issued a Memorandum Opinion and Order (the "Memorandum Opinion") (Pet. App. at 24a) in response to numerous motions to dismiss and for summary judgment or partial summary judgment. The court:

1. denied Defendant Lutheran Foundation of Texas's October 26, 1995, Motion to Reconsider the May 3, 1995, Order Granting Partial Summary Judgment;
2. denied Defendant American Council on Gift Annuities' and Defendant Lutheran Church Missouri Synod's ("LCMS") November 22, 1995, Motion for Partial Summary Judgment on Texas Statutory Claims;

3. denied Defendants' December 14, 1995, Motion to Dismiss based on the Antitrust Relief Act;
4. denied Defendant Northwestern University's Motion for Summary Judgment on the Antitrust Relief Act filed January 26, 1996;
5. granted Plaintiff's February 13, 1996, Motion for Leave to File Fourth Amended Class Action Complaint;
6. denied Defendants' August 27, 1996, Renewed Motion for Relief based on the above motions; and
7. abated all discovery except that pertinent to whether the Council was entitled to the new antitrust exemption.

In different permutations, Defendants appealed ruling numbers (2) - (6) of the Memorandum Opinion. Petitioners filed three separate notices of appeal. Twenty-nine Defendants, led by the Council, filed one (the "Council Notice"). Three Defendants, the American Bible Society, the American Leprosy Missions, and the Moody Bible Institute of Chicago jointly filed a separate notice (the "Moody Notice"), and Northwestern University ("Northwestern"), despite also joining the Council Notice, filed a separate notice. All Defendants appealed the denial of their motion to dismiss based on the Antitrust Relief Act. The Council Notice also appealed the denial of the motion for partial summary judgment on state law claims (no. 2) filed by the Council and LCMS—including the appeal of 27 Defendants who were unaffected by that ruling—and also

appealed the denial of the "Renewed Motion for Relief" (no. 6). Those 29 Defendants, plus the Moody Notice Petitioners, also appealed the Court's grant of leave to amend to file the Fourth Amended Class Action Complaint (no. 5). Finally, Northwestern filed a notice of appeal concerning the motion to dismiss (no. 3) and its own motion for partial summary judgment (no. 4).

All Petitioners joined the same Statement of Jurisdiction predicating jurisdiction on 28 U.S.C. § 1291. Invoking the rare "collateral order doctrine," Defendants stated that jurisdiction existed because the order denying their motion to dismiss based on the Antitrust Relief Act (no. 3) and the trial court's permitting the pleading amendment (no. 5) satisfied the three elements of the collateral order doctrine. Petitioners sought to equate the District Court's ruling regarding the Antitrust Relief Act with an immunity from suit. This claim was particularly surprising because nowhere in their briefing on these issues before the District Court had Petitioners asserted that the Antitrust Relief Act was an immunity as opposed to an ordinary defense on the merits. Additionally, Petitioners' Statement of Jurisdiction, however, offered no basis for jurisdiction over the denial of the so-called Renewed Motion for Relief (no. 6), the motions for partial summary judgment on state law claims filed by the Council and the LCMS (no. 2), or Northwestern's partial summary judgment motion (no. 4).

Thus, although Defendants purported to appeal rulings nos. 2, 3, 4, 5, and 6, the Statement of Jurisdiction alleged

jurisdiction only as to rulings nos. 3 and 5.[2] Also without an asserted jurisdictional basis were Defendants' efforts to raise as a group the district court's March 14, 1995 denial of three (and only three) Defendants' motion to dismiss that occurred *eighteen months* prior to the filing of the notice of appeal.[3]

In addition to attempting to invoke appellate jurisdiction, Petitioners sought mandamus in the Fifth Circuit attacking the same rulings that were at issue in the direct appeal. Yet, as the Fifth Circuit correctly held, none of the rulings approached the type of trial court abuse justifying such an extreme measure.

In sum, Defendants' invocation of the Fifth Circuit's appellate jurisdiction based on the collateral order doctrine and pendent jurisdiction was frivolous as was their attempt to seek mandamus. Even on the one jurisdictional basis they attempted to justify—the applicability of the collateral order doctrine to the district court's denial of the Antitrust Relief Act motion to dismiss—they failed to provide a meaningful basis for appeal. Accordingly, the Fifth Circuit properly sanctioned Petitioners and dismissed the appeals in their entirety.

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[2]Later in their Appellants' Brief, Petitioners weakly asserted that their appellate point about the motions for partial summary judgment on state law (no. 2) "arguably" fell within the Fifth Circuit's "*Cohen* jurisdiction, either as the equivalent of a qualified immunity under *Martin* or as with the Court's pendent jurisdiction."

[3]In denying this motion to dismiss, the District Court properly found that charitable gift annuities constituted trade or commerce within the meaning of the Sherman Act.

REASONS FOR DENYING THE PETITION

The Fifth Circuit properly dismissed this ill-conceived appeal for lack of jurisdiction and imposed sanctions on Petitioners. Yet, Petitioners ask this Court to grant certiorari in order to reverse the Fifth Circuit's construction of the Antitrust Relief Act on which the dismissal and sanctions were based. But the present case does not merit granting certiorari because it presents neither a conflict of federal law nor an important jurisprudential issue. Additionally, this Court should not grant certiorari, vacate, and remand these interlocutory appeals because the District Court is currently considering motions to dismiss based upon the Amended Antitrust Relief Act. Moreover, even if the Court were inclined to do so, it should leave untouched the Fifth Circuit's award of sanctions as the Amended Antitrust Relief Act has no bearing on that correct ruling.

A. THIS CASE PRESENTS NO CONFLICT AND INVOLVES NO ISSUE OF JURISPRUDENTIAL IMPORTANCE.

Petitioners do not contend that this case presents a conflict with a decision of any other court of appeals, but they do incorrectly contend that the Fifth Circuits' ruling conflicts with this Court's holdings in *Behrens v. Pelletier*, 116 S.Ct. 834 (1996) and *Mitchell v. Forsyth*, 472 U.S. 511 (1985). Petitioners assert that the Fifth Circuit erroneously found that fact issues precluded their interlocutory appeal when, in fact, they claim to have been raising purely legal issues. Petitioners argue that the legal issue of whether the Antitrust Relief Act authorized "hybrid" conspiracies preceded any factual inquiries.

But that view fails to "come to grips" with the plain language of the statute. Regardless of who was involved in the conspiracy, the statute only applied to persons "described in section 501(c)(3) of title 26 [and] exempt from taxation under section 501(a) of title 26 ... ." Thus, the Fifth Circuit was correct and consistent with *Behrens v. Pelletier* and *Mitchell v. Forsyth* when it said, "[e]ven were we to assume *arguendo* that the Relief Act legalizes conspiracies between exempt and non-exempt entities, there would not be an appealable immunity issue, as the bases on which Richie has challenged the defendants' § 501 (c)(3) determinations are factual." (Pet. App. at 11a n. 11 (citations omitted)). Petitioners assert that if hybrid conspiracies were legalized by the Act, then their status as a § 501(c)(3) organization would be immaterial, but this is not so. In order to avail themselves of any purported immunity created by the Act, Petitioners had to factually meet the terms of the statute and that is precisely what Respondent had challenged in the District Court. As the Fifth Circuit and District Court stated, Respondent "stated a claim as to the defendants he claims are non-exempt." (Pet. App. at 9a) As a result, the Fifth Circuit's ruling is consistent with this Court's precedent.

The present case presents no issue of broad public importance or a jurisprudential matter calling for the supervision of this Court. Petitioners apparently seek to have this Court review the Fifth Circuit's decision under either the Antitrust Relief Act as it existed at the time of the opinion or under its subsequent amendment. Yet, any ruling on the version Antitrust Relief Act construed by the Fifth Circuit will have no

significance now. Respondent knows of no other pending case that could arguably involve construction of the Antitrust Relief Act as it existed prior to July 3, 1997. And since the statute has been amended, the issues raised and ruled upon by the Fifth Circuit will not be before any court again. Similarly, Respondent knows of no other cases involving the application of the Amended Antitrust Relief Act.

B. THE UNIQUE PROCEDURAL POSTURE OF THIS CASE RENDERS IT UNSUITABLE FOR CERTIORARI REVIEW.

The Court should refuse to grant certiorari in this case because its unique posture renders it an unsuitable case for certiorari review. Petitioners seek certiorari review based upon a statute that has not been appropriately addressed by any lower courts in this case. The application of the 1997 amendments to the Antitrust Relief Act was not, and could not have been, raised below. *C.f., Gray v. Netherland*, 116 S.Ct. 2074 (1996) ("If the claim was not raised or addressed in federal proceedings, below, our usual practice would be to decline to review it."); *Yee v. Escondido*, 503 U.S. 519, 533, 112 S.Ct. 1522, 1531 (1992) (same). Moreover, Petitioners' attempt to use *United States v. Peggy Schooner*, 1 Cranch 103, 2 L. Ed. 49 (1801), to require application of the Amended Act in this Court is misplaced in light of the Court's practice of granting certiorari, vacating, and remanding in cases in which the law changes. In fact, the Petitioners have filed motions to dismiss this case in the District Court on which a ruling is expected soon. Given that the present appeal is merely an interlocutory appeal with a shaky jurisdictional basis anyhow, a proper respect for the roles of

both this Court and those of the lower federal courts militates in favor of not granting certiorari and allowing the parties to address the new issues raised by the Amended Antitrust Relief Act through the District Court first.

C. THE FIFTH CIRCUIT PROPERLY SANCTIONED PETITIONERS.

Petitioners claim that the Fifth Circuit abused its discretion in sanctioning them for their frivolous appeals. But the Court properly awarded Plaintiff less than fifteen percent of its costs and fees involved in responding to these appeals under FED. R. APP. P. 38. It properly found, based on applicable Fifth Circuit caselaw, that Petitioners' were pursuing "legal points not arguable on the merits" or points "in which the result [was] obvious." (Pet. App. at 21a (citing *Olympia Co., Inc. v. Celotex Corp.*, 771 F.2d 888, 893 (5th Cir. 1985); *Coghlan v. Starkey*, 852 F.2d 806, 810 (5th Cir. 1988)). Specifically, as noted in part A. above, the Fifth Circuit correctly found that fact issues precluded jurisdiction in the court of appeals. As a result, it sanctioned Petitioners in the amount of $15,000.00—which was just over ten percent of the attorney's fees and cost that Respondent estimated had been incurred in defending against Defendants' frivolous appeals.[4]

Contrary to Petitioners arguments, nothing in the Amended Act alters appropriateness of sanctions in this case.

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[4]At oral argument, the Fifth Circuit requested that Plaintiff submit a summary of its attorney time and expenses for use by the court in assessing possible sanctions. At that time, Respondent's attorneys had incurred approximately $125,000.00 in attorney's fees and expenses responding to Petitioners' ill-fated appeal.

The Amended Act does not change the standard for imposing sanctions used by the Fifth Circuit—frivolity. If anything, the Amended Act evidences additional reasons for imposing sanctions—that no immunity from suit appeared on the face of the Antitrust Relief Act.

In short, the Fifth Circuit's ruling was not only justified, but required by the blatant disregard shown by Petitioners for a number of applicable standards. In fact, even if the Fifth Circuit's rationale for sanctions regarding fact issues was wrong, that court reached the correct result.

1. Numerous Frivolously Appealed Rulings in Addition to those Regarding the Antitrust Relief Act Support the Sanctions.

Petitioners ignore the procedural history of this case to argue that if the Fifth Circuit was incorrect on the Antitrust Relief Act, then no sanctions were proper. But a look at all of the different potential reasons for imposing sanctions reveals the merit in the award. In the Fifth Circuit, Plaintiff moved to dismiss Defendants' appeals in their entirety on every issue because none of the rulings appealed were final judgments or collateral orders under 28 U.S.C. § 1291. Plaintiff also sought dismissal of attempted appeals from rulings that preceded the District Court's Memorandum Opinion by over eighteen months; attempted appeals of partial summary judgments against certain defendants on state law issues; and attempted appeals of rulings on issues in which almost all Defendants failed to join. In addition, Petitioners brought a meritless mandamus action. A cursory reading of the Fifth Circuit's opinion reveals its

frustration at the unnecessary filings of Defendants in addition to failing to recognize the factual disputes preventing interlocutory appeal. These various actions justified sanctions.

2. The Fifth Circuit Properly Sanctioned Petitioners Because the Antitrust Relief Act Created No Plausible Basis for Finding an Immediately Appealable Immunity From Suit.

Yet, the most important additional ground on which the Fifth Circuit could have sanctioned Petitioners was its attempt create an immunity from suit out of the Antitrust Relief Act. Nothing in the language or legislative history of the statute upon which Petitioners relied in the Fifth Circuit even remotely hinted that Defendants were granted any kind of extraordinary immunity from suit. Moreover, nothing in the District Court's rulings was effectively unreviewable on appeal; conclusively determined anything; or was completely separate from what Plaintiff must prove to prevail on the merits.

The Fifth Circuit clearly lacked jurisdiction because the district court's rulings did not meet each of the three elements of the collateral order doctrine. First, Defendants asserted that the rulings were "effectively unreviewable" on appeal after trial because the Act "effectively 'confers an immunity from suit.'" The Act, however, simply created a defense to liability, not an immunity from suit, and as such was not immediately appealable. *Digital Equip. Corp. v. Desktop Direct, Inc.*, 114 S. Ct. 1992, 2003 (1994).

The plain terms of the Act made no reference to any kind of immunity. Defendants' assertion was, in essence, that

they were not subject to a claim upon which relief can be granted, and such assertions could not be immediately appealable. *Digital Equip. Corp.*, 114 S.Ct. at 1998. The Antitrust Relief Act, unlike the 1997 amendments, created only a substantive rule of decision on the merits. As such, early disposition of the case was the natural benefit of satisfying the elements of the statute and not an immunity from suit.

In the absence of express statutory language creating an immunity from suit, immunities from suit are predicated upon deeply rooted and fundamental Constitutional or other interests that can only be protected if there is immunity from suit. *Id.* No such interests existed in this case. Defendants only pointed to *freedom from the burdens of litigation* as the basis for their claim of immunity. Such an interest was not enough, as a matter of law. *Van Cauwenberghe v. Biard*, 486 U.S. 517, 524 (1988).

The district court's rulings also did not conclusively establish anything in this case. The District Court expressly stated an intention to revisit its rulings. Hence, they were not appealable. *Swint v. Chambers County Comm'n*, 115 S.Ct. 1203, 1208 (1995). Finally, the district court's rulings involved questions of conspiracy and fraud inextricably tied to the merits of the case, and as such were not appealable. *Johnson v. Jones*, 115 S.Ct. 2151, 2157 (1995). Accordingly, the collateral order doctrine did not apply, and could not provide a colorable basis for appellate jurisdiction.

D. GRANTING WRIT, VACATING, AND REMANDING IS NOT JUSTIFIED IN THIS INTERLOCUTORY APPEAL.

While the Court does occasionally grant certiorari, vacate, and remand for consideration of changes in the law, those cases typically to do not involve interlocutory appeals such as this in which the parties have ready access review of the changed law by pursuing relief in the District Court. In these instances, the Court should not exercise its discretion to grant certiorari, vacate, and remand. The Court should not use its limited resources on an issue that has not been addressed by any of the lower courts. Here, the District Court is already considering the application of the new law by way of Petitioners renewed motions to dismiss and for judgment on the pleadings. Briefing is complete, and Defendants certainly will test the decision by appellate review should their pending motions be denied. Respondent anticipates that the District Court will rule soon.

Even if the Court were inclined to grant certiorari, vacate, and remand, it should not do so with respect to the award of sanctions by the Fifth Circuit. As noted above, the award was justified for many reasons, and nothing in the Amended Antitrust Relief Act changes the analysis to be applied in assessing appellate sanctions.

CONCLUSION

For these reasons, the Petitions for Writ of Certiorari should be denied.

Respectfully submitted,

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